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No. 02-1648

Supreme Court, U.S.
FILED
OCT 2 4 2003
OFFICE OF THE CLERK

In The Supreme Court of the United States

JERRY BRYAN KEITH,

Petitioner,

v.

DOUG DRETKE, DIRECTOR,
TEXAS DEPARTMENT OF CRIMINAL JUSTICE,
INSTITUTIONAL DIVISION,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

PETITION FOR REHEARING OF DENIAL OF WRIT OF CERTIORARI

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13 pp

QUESTION PRESENTED FOR REHEARING

QUESTION NO. ONE: The cornerstone of the American judicial system is the right to a fair and impartial process. Therefore, any judicial officer incapable of presiding in such a manner violates the due process rights of the party who suffers the resulting effects of that judicial officer's bias. The Due Process Clause of the Fourteenth Amendment establishes a constitutional floor, [however,] not a uniform standard. This floor "clearly requires a 'fair trial in a fair tribunal,' before a judge with no actual bias against the defendant." To demonstrate such a due process violation and secure relief based thereon, Petitioner established – through the affidavits of fact of 3 jurors in a prior, unrelated trial – that a genuine question exists concerning his trial judge's impartiality. Since adjudication before a biased trial judge falls within the "very limited class of cases" that represents a "structural" error subject to automatic reversal, was Petitioner entitled to habeas corpus relief?

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PETITION FOR REHEARING OF DENIAL OF WRIT OF CERTIORARI

Petitioner, Jerry Keith respectfully petitions this Court to rehear the denial of the writ of certiorari to review the United States Fifth Circuit Court of Appeals' denial of a Certificate of Appealability and denial of habeas relief on important issues impacting every defendant in a criminal case.

OPINIONS BELOW

The opinions and orders, the subject of the Writ of Certiorari, are set forth in the Petition for Writ of Certiorari, to which this Honorable Court's attention is directed.

JURISDICTION

This Court has jurisdiction over this Petition for Rehearing as the denial of the Writ of Certiorari occurred on October 6, 2003.

CONSTITUTIONAL AMENDMENT INVOLVED

1. **U.S. CONSTITUTION, amend. 14, section 1.**

> **Section 1.** All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of

life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

Petitioner is a prisoner in state custody. Petitioner filed a writ of habeas corpus in state court that addressed, *inter alia*, the trial judge's extra-judicial exposure to facts and his pre-judgment of Petitioner's guilt and the certainty of his conviction in the case *sub judice*.

Facts Relevant to Rehearing

Petitioner was charged by indictment in Cause No. 2624, which alleged that Petitioner had committed sexual assaults on the three children on May 15, 1994. Petitioner was subsequently indicted in Cause No. 2631. This indictment alleged events on or about June 1, 1991, or three years before the indictment in Cause No. 2624. While the alleged victims were the same, the facts were totally different.

In early April, 1995, a jury convicted Petitioner in Cause No. 2624 of the events that were alleged to have occurred in 1994, and awarded probation. After the jury was discharged, the trial judge spoke to those jurors and told them, "That we, the jury did what we had to do, the state had a weak case with very little to go on. That there were several facts that could not be brought up in this trial. That these facts would be brought up in a second trial in which the state/prosecution had a much stronger case. That Petitioner would be convicted in the next trial

and go to prison." Affidavits of Jurors, Appendix I to Petition for Writ of Certiorari.

When Judge Enns discussed the indictment in Cause No. 2631 with the jurors in Cause No. 2624, there had been no proceedings at that time by which Judge Enns could have become familiar with the facts of Cause No. 2631, the factual allegations involved totally different events that supposedly occurred in 1991 (not 1994 as in Cause No. 2624), Petitioner would not even be arraigned until May 8, 1995, and Cause No. 2631 would not even be tried until almost three months later, on or about June 27, 1995. (Docket Sheet in Cause No. 2631, State Court Records, Vol. 1, pp. 15-17)

In summary, the trial judge made his statements more than one month before the first proceeding was had in connection with Cause No. 2631 – before any proceeding in which the judge could have learned the facts of the second indictment and thereby properly formed an opinion of the strength of the State's case against Petitioner.

REASONS FOR REHEARING

Reason 1: After the Petition for Writ of Certiorari was filed, the Fifth Circuit decided *Bigby v. Cockrell*, 340 F.3d 259 (5th Cir. 2003) and correctly applied a structural error analysis to a judicial bias issue. Had the Fifth Circuit applied the same analysis to Petitioner's case, Petitioner would have been entitled to habeas corpus relief. Since it applied a harmless error in this case, the Fifth Circuit failed to follow this Court's precedent.

Stated succinctly, the cornerstone of the American judicial system is the right to a fair and impartial process.[1] Therefore, any judicial officer incapable of presiding in such a manner violates the due process rights of the party who suffers the resulting effects of that judicial officer's bias.[2] The Due Process Clause of the Fourteenth Amendment "establishes a constitutional floor, [however,] not a uniform standard."[3] This floor "clearly requires a 'fair trial in a fair tribunal,' before a judge with no actual bias against the defendant or interest in the outcome of his particular case."[4] The crux of Petitioner's habeas corpus complaint is that Judge Enns' statements to the jurors in the first indictment demonstrated a prejudgment of guilt and an impermissible bias that ultimately violated Petitioner's clearly established constitutional right to a fair

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[1] *See, e.g.*, *Bracy v. Gramley*, 520 U.S. 899 (1997).

[2] *See, id.*

[3] *Id.* at 904.

[4] *Id.* at 905. (citation omitted).

trial. The Fifth Circuit's holding that Judge Enns' extra-judicial exposure to the facts of Cause No. 2631 and his pre-judgment of Petitioner's guilt in Cause No. 2631 was not constitutionally disqualifying and subject to a "harmless error" analysis, conflicts with prior decisions of this Honorable Court and with its decision in *Bigby v. Cockrell, supra.*

Petitioner recognizes that "bias by an adjudicator is not lightly established."[5] But this Honorable Court has consistently enforced the basic right to due process and found that decision makers are constitutionally unacceptable when: (1) the decision maker has a direct personal, substantial, and pecuniary interest in the outcome of the case; (2) an adjudicator has been the target of personal abuse or criticism from the party before him; and (3) a judicial or quasi judicial decision maker has the dual role of investigating and adjudicating disputes and complaints. To demonstrate such a due process violation and secure relief based thereon, Petitioner was required to establish that a genuine question exists concerning Judge Enns' impartiality.[6] Moreover, adjudication before a biased trial judge falls within the "very limited class of cases" that represents a "structural" error subject to automatic reversal.[7]

The Supreme Court clarified that an "extrajudicial source" is not the "only basis for establishing disqualifying

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[5] *Valley v. Rapides Parish Sch. Bd.*, 118 F.3d 1047, 1052 (5th Cir. 1997).

[6] *See Liteky v. United States*, 510 U.S. 540, 552 (1994).

[7] *Neder v. United States*, 527 U.S. 1, 7-8 (1999).

bias or prejudice."[8] This Honorable Court noted that "[a] favorable or unfavorable predisposition can also deserve to be characterized as 'bias' or 'prejudice' because, even though it springs from the facts adduced or the events occurring at trial, it is so extreme as to display clear inability to render fair judgment."[9] Writing separately to concur in the judgment, Justice Kennedy, with whom Justices Blackmun, Stevens, and Souter joined, agreed "with the Court insofar as it recognizes that there is no *per se* rule requiring that the alleged impartiality arise from an extrajudicial source."[10] And in the context of judicial bias, this Honorable Court set the parameters as to what is constitutionally disqualifying conduct, when it held that a prejudgment of guilt is constitutionally disqualifying.[11]

It is uncontroverted that there had been no proceedings in Cause No. 2631 by which Judge Enns could have learned the facts associated with the indictment in that case when he spoke to the jurors in Cause No. 2624. Judge Enns' comments were not a expression of an opinion formed during the trial of Cause No. 2624 – they were statements about a case of which Judge Enns should have had no knowledge of the facts or the strength of the State's case. The factual allegations involved totally different events that allegedly occurred in 1991 – not 1994 as in Cause No. 2624. Petitioner was not even arraigned until May 8, 1995 – more than a month later; and Cause No.

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[8] *Liteky*, 510 U.S. at 551.

[9] *Id.* (citations omitted).

[10] *Id.* at 557.

[11] *Ungar v. Sarafite*, 376 U.S. 575, 587-88 (1964). *See also, Bracy v. Gramley, supra.*

2631 would not even be tried until almost three months later, on or about June 27, 1995. Docket Sheet in Cause No. 2631, State Court Records, Vol. 1, pp. 15-17.

The affidavits of the jurors in Cause No. 2624 affirmatively show that Judge Enns had been extra-judicially exposed to the facts in Cause No. 2631, had determined the strength of the State's case and had pre-judged Petitioner's guilt in that case. Appendix I to Petition for Writ of Certiorari. Since there had been no proceedings in Cause No. 2631 on April 6, 1995, when Judge Enns made his statements to the jurors in Cause No. 2624, the source of his information *must* be extrajudicial and constitutionally disqualify the judge as they are *not* merely the result of his exposure to the merits of Cause No. 2631.[12]

The Fifth Circuit, in denying the writ of habeas corpus, required Petitioner to show where the jurors in Cause No. 2631 had heard the comments, or how Judge Enns' bias was demonstrated on the record or affected the jury – concluding that without such a showing, Petitioner had not demonstrated harm. Appendix A, at A2 to Petition for Writ of Certiorari. This holding conflicts with the holding in *Bigby v. Cockrell, supra*.

But the question should not be whether the trial judge's bias was evident, or whether the jury who convicted Petitioner heard the conversation or was improperly influenced by the judge. Under this Honorable Court's decisions, the proper questions are: (i) was the trial judge biased; (ii) had he pre-judged Petitioner's guilt; or (iii) had he formed an opinion that derived from an extrajudicial

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[12] *Liteky v. United States*, 510 U.S. 540 (1994).

source; and, if so, (iv) do they reveal such a high degree of antagonism as to make fair judgment impossible?[13]

And being required to show harm conflicts with *Rose v. Clark*,[14] where this Court held that the trial judge's bias against Petitioner is not subject to a harmless-error review. If the trial judge was biased, or if he had pre-judged Petitioner's guilt, then this is a constitutional violation that is not subject to the "harmless-error" analysis but is instead a structural defect "affecting the framework within which the trial proceeds."[15] This is so, because "the impact of the error on the jury's performance of its duties cannot be reviewed."[16] In the context of a harmless-error analysis, therefore, the first analysis herein is whether the judge was impartial. If the judge was not impartial, then no harmless-error can be engaged in, for this is a structural error that requires reversal of the denial of the writ of habeas corpus.

CONCLUSION

If this Honorable Court denies rehearing, it will severely compromise this Honorable Court's precedents that hold that a pre-judgment of guilt is constitutionally disqualifying and that denial of a trial before a fair tribunal is a structural error, requiring reversal. This Court

[13] *Tumey v. Ohio*, 273 U.S. 510 (1927); *Ungar v. Sarafite*, 376 U.S. 575, 587-88 (1964); *Liteky v. United States*, 510 U.S. 540, 555 (1994).

[14] 478 U.S. 570, 577-78 (1986).

[15] *Arizona v. Fulminante*, 499 U.S. 279, 309 (1991).

[16] *Ibid. See also, Rose v. Clark*, 478 U.S. at 577-78.

should therefore grant the Petition for Rehearing of the Petition for Writ of Certiorari and hear this case on the merits. Petitioner has shown substantial violations of his constitutional rights – violations that render his incarceration illegal and that warrant habeas relief. Petitioner has also demonstrated the Fifth Circuit's failure to properly follow this Court's precedent on this important Fourteenth Amendment issue. This Court should grant Petitioner all relief to which he is entitled.

Respectfully submitted,

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Certification of Counsel

I, the undersigned counsel, certify that this Petition for Rehearing is restricted to the grounds specified in Rule 44.2, Supreme Court Rules, it is presented in good faith and not for delay.

_____
L.T. "Butch" Bradt